

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

Chapter VIII, Rule 32(2) (b)
Description of case

Crl. Misc. Application No. 469 of 2006

Date of Decision: 27-6-2006

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date:- 27-6-2006

Initials of Judge

Note:- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Misc. Application No. 469 of 2006

Jagdamba Prasad Kothari
S/o Shri Harinand Kothari
R/o village Jaghar Ranichauri
Patti Makholgi
District Tehri Garhwal ...Applicant

Versus

1. State of Uttaranchal
2. Shri Bal Govind s/o Shri Umar Dutt
R/o village Paligarh
Patti Akari
District Tehri Garhwal Respondents

Dated: 27th June, 2006

Sri Tanuj Semwal learned counsel for the applicant.
Sri Amit Bhatt, learned A.G.A. for the State.

Hon'ble J.C.S. Rawat, J.

1. The petition under section 482 Cr.P.C. has been filed for quashing the impugned order dated 09.03.2006 passed by the Judicial Magistrate-Ist Class, Tehri Garhwal in final Report No. 90/2003 directign to register the protest petition as a complaint case and the summoning order dated 16.05.2006 passed by the Special Judicial Magistrate, Ist Class, Tehri Garhwal in criminal case No. 49/2006 as well as the entire proceedings of the criminal case no. 49/2006.

2. Brief facts of the case are that on 16.11.2002 the respondent no.2-Bal Govind has lodged and FIR before the Patwari Circle Ranichauri District Tehri Garhwal against the applicant under sections 498A, 304B, 147, 201 IPC. The matter was investigated by the I.O, who submitted the final report on 14.03.2005 and it has been registered as final report No. 90/2003 in the court

of Judicial Magistrate, Tehri Garhwal. Feeling aggrieved by the final report, the complainant filed a protest petition before the Magistrate. Thereafter, the Magistrate rejected the final report on 09.03.2004 and sent it back for further investigation. The I.O. further investigated the matter and finally he came to the conclusion that no case is made out. The Magistrate after hearing the parties rejected the protest petition and accepted the final report on 04.11.2004. Feeling aggrieved by the order dated 04.11.2004 passed by the learned Magistrate, the complainant preferred a revision before the sessions Judge. Vide order dated 24.05.2006 the Sessions Judge has allowed the revision directing the magistrate to go through the entire evidence on record. The magistrate was further directed to pass appropriate orders in accordance with law. The Sessions Judge has also observed that the magistrate can record the evidence if he desires. Thereafter, the magistrate while hearing the matter again on 09.03.2006 has accepted the final report and directed to register the protest petition as complaint. The complainant filed a complaint pursuant to the order dated 09.03.2006 and the same was registered as criminal case No. 49/2006 against the applicant and 10 other persons. The learned Magistrate recorded the statements under section 200 & 202 Cr.P.C. and thereafter he took cognizance against the applicant under section 498A, 304B IPC vide order dated 16.05.2006. Feeling aggrieved by both the orders passed by the learned Magistrate, the applicant preferred the present petition.

3. Learned counsel for the applicant contended that once the Magistrate has accepted the final report he had no option to register the complaint and to record the statements under sections 200 & 202 CrPC. It was

further contended that the evidence is not reliable and it cannot be taken into account to record the cognizance order. Learned AGA refuted the contention. When a report forwarded by the police to the Magistrate under section 173(2)(i) is placed before him several situations arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may either (1) accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under section 156(3) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate he has again option of adopting one of the three courses open i.e. (1) he may accept the report and drop the proceeding; or (2) he, may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under section 156(3). The position is, therefore, now well settled that upon receipt of a police report under section 173(2) a Magistrate is entitled to take cognizance of an offence under section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an

opinion that the investigation has made out a case against the accused. The magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise his powers under section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in section 200 & 202 of the Code for taking cognizance of a case under section 190(1)(a) though it is open to him to act under section 200 or section 202 also. **{See India Carat (P) Ltd. Vs. State of Karnataka 1989 (2) SCC p/132, 1989 SCC(Cri) 306}.**

4. When the Magistrate in exercise of powers under section 173 refers the final report to the I.O. again and again and the I.O. he is submitting the final report, the Magistrate had no option either to accept the final report or to direct the complainant to file the complaint or to treat the protest petition as a complaint.

5. It is also well settled position of law that while considering the provisions of sections 156(3), 169, 178 & 190 of the Code held that there is no power, expressly or impliedly conferred, under the Code, on a Magistrate to call upon the police to submit a chargesheet, when they have sent a report under section 169 of the Code, that there is no case made out for sending up an accused for trial. The functions of the magistracy and the police are entirely different, and the Magistrate cannot impinge upon the jurisdiction of the police, by compelling them to change their opinion of as to accord with his view. However, he is not deprived of the power

to proceed with the matter. There is no obligation on the Magistrate to accept the report if he does not agree with the opinion formed by the police. The power to take cognizance notwithstanding formation of opinion by the police which is the final stage in the investigation has been provided for in section 190(1)(c).

6. In view of the foregoing discussions, I am of the view that the contention raised on behalf of the applicants has no force and the complaint is maintainable.

7. It was further contended that the evidence, which has been adduced before the court, is not reliable and it cannot be taken into account. Learned AGA refuted the contention. The Hon'ble Supreme Court in **R.P. Kapur Vs. State of Punjab 1960(3) SCR p/388, AIR 1960 SC p/866, 1960 Cri. L.J. p/1239** summarized some categories of case where inherent power can and should be exercised to quash the proceedings:-

- (i) Where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;
- (ii) Where the allegations in the first information report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged;
- (iii) Where the allegations constitute an offence, but there is not legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

8. In dealing with the last category, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. This Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is function of the trial judge. Judicial process should not be an instrument of oppression, or, needless harassment. The court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. The High Court should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. **{See State of Orissa Vs. Saroj Kumar Sahoo 2006(2) SCC(Cri) p/272, R.P. Kapur Vs. State of Punjab A.I.R. 1960 SC 866, M. Krishnan Vs. Vijay Singh & another 2001 (8) SCC 645 and state of Haryana Vs. Bhajan Lal AIR 1992 SC 604, 1992 SCC(Cri) 426.}**

9. In the instant case, the averment made in the complaint are sufficiently disclosing the commission of offence and it has also been alleged that soon before death Smt. Shanti Devi was subjected to cruelty. The

evidence under sections 200 & 202 Cr.P.C. also supports the prosecution version. This Court cannot decide as to whether the evidence is reliable or not. It has been held by the Hon'ble Apex Court in **M. Narayandas Vs. State of Karnatak 2004 Cri.L.J. p/822** that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice.

10. It is not permissible of the High Court to look into materials, the acceptability of which is essentially a matter of trial. While exercising jurisdiction under section 482 Cr.P.C., it is not possible for this Court to act as if it is a trial court. **{State of M.P. Vs. Awadh Kishore Gupta and others SCC (Cri) 2004 p/353}.**

11. In view of the above, the petition lacks merit and is dismissed. All the pending miscellaneous application(s) in this case, if any, shall stand disposed of accordingly.

(J.C.S. Rawat, J.)

Dated 27.06.2006

LSR